

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Applications of)	
)	
JAMES A. KAY, JR.)	FCC File Nos. 171205, 411671, 412026,
)	415407, and 415304
For Modification of Stations WNQK532, WIJ992,)	
WIJ893 and WII621 and Assignment of Station)	
WIK902)	

MEMORANDUM OPINION AND ORDER

Adopted: March 29, 2002

Released: April 1, 2002

By the Acting Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

1. *Introduction.* We have before us a petition for reconsideration (Petition) filed by James A. Kay, Jr. (Kay) on January 2, 2001.¹ Kay requests reconsideration of the decision by the Chief, Licensing and Technical Analysis Branch (LTAB), Public Safety and Private Wireless Division, Wireless Telecommunications Bureau dismissing the above-captioned applications.² For the reasons stated below, we grant Kay's Petition with respect to three of the applications, and deny the Petition with respect to the remaining applications.

2. *Background.* Kay filed four modification applications between March 1, 1989 and July 5, 1994, to add frequencies to Business Radio Service Stations WNQK532, WIJ992, WIJ893, and WII621 in and around the Los Angeles, California area (FCC File Nos. 171205, 411671, 412026, 415407). While these applications were pending, Kay filed timely applications to renew the licenses for Stations WNQK532, WIJ992, and WIJ893, which were scheduled to expire on October 2, 1994, August 18, 1994, and November 7, 1994, respectively. The renewal applications remain pending. The license for Station WII621, however, expired on August 21, 1995, because a timely renewal application for this facility was not filed. At this time, the modification application associated with this station (FCC File No. 415407) had not been acted on by the Commission.

3. On April 11, 1994, Francisco Padilla (Padilla) sought to assign the license for Station WIK902, Los Angeles, California to Kay. The license for Station WIK902 was scheduled to expire on June 13, 1996. Concurrently with the assignment application, Kay sought to modify the license of Station WIK902.³ The license for Station WIK902 expired on June 13, 1996, while the assignment/modification application was still pending, because a timely renewal application for this facility was not filed.

4. On December 4, 2000, five separate computer-generated dismissal letters were sent to Kay through the Commission's Universal Licensing System (ULS) regarding the subject applications.⁴ These

¹ James A. Kay, Jr. Petition for Reconsideration, filed January 2, 2001 (Petition). Kay subsequently filed a supplement to the Petition. James A. Kay, Jr. Supplement to Petition for Reconsideration, filed January 3, 2001 (Supplemental Petition).

² See automated dismissal letters (FCC Form 699) to James A. Kay, Jr. dated December 4, 2000 (Dismissal Letter(s)).

³ FCC File No. 415304.

⁴ Dismissal Letters.

computer-generated letters noted that “[t]he license for which this application has been filed has recently expired.”⁵ Kay asks that we reconsider the dismissal of the subject applications and that the applications be reinstated and granted.

5. *Discussion. Stations WNQK532, WIJ992, WIJ893, and WII621.* Kay argues that it was an error for the LTAB to dismiss the modification applications for Stations WNQK532, WIJ992, WIJ893, and WII621, because the licenses for these stations have not expired.⁶ In this connection, Kay states that “timely renewals were filed” and points to Section 1.62(a)(1) of the Commission’s Rules, which requires that a license continues in effect until the Commission reaches a final determination on any timely-filed renewal application for that license.⁷ We agree with Kay’s interpretation of Section 1.62 of the Commission’s Rules and its applicability to the instant matter. Given that Kay filed renewal applications for Stations WNQK532, WIJ992, and WIJ893, that such applications were timely filed, and those applications are still pending, pursuant to Section 1.62 of the Commission’s Rules, the licenses for these stations have not yet expired. Therefore, we find that it was erroneous for the LTAB to dismiss the modification applications pertaining to such stations on the basis that the license had expired. Consequently, we will reinstate the modification applications for these three stations *nunc pro tunc*.

6. With respect to Station WII621, however, we believe that a different analysis is necessary to determine the appropriate current status of the associated modification application because as noted previously, there is no record of the filing of a renewal application for this station. As a result, the license for station WII621 expired on August 21, 1995. Once this event occurred and became final, there was nothing to modify because the authorization no longer existed.⁸ As a result, we believe that the LTAB dismissal of the modification application regarding Station WII621 was ministerial in nature because no action could be taken on the application due to the non-existence of an underlying authorization.⁹

7. *Station WIK902.* Regarding the dismissal of the assignment/modification application for Station WIK902, Kay argues that Padilla timely filed an application to renew prior to Station WIK902’s license expiration date.¹⁰ Next, Kay asserts that even if it is determined that no renewal application was filed, the Bureau’s lack of candor in this matter requires that its action “be set aside.”¹¹ Kay also claims that the expiration of a license does not justify the dismissal of a pending application for assignment of

⁵ *Id.* We note that this type of dismissal letter is automatically and routinely generated when ULS detects pending applications where the underlying license is no longer valid.

⁶ Petition at 2.

⁷ *Id.* 47 C.F.R. § 1.62(a)(1). See also 5 U.S.C. § 558(c) (“When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.”). See also Herbert L. Schoenbohm, *Initial Decision*, 11 FCC Rcd 1146, 1146 ¶ 1 (ALJ 1996); Mobilcom Pittsburg, Inc., *Order*, 9 FCC Rcd 509, 509 ¶ 2 (1994).

⁸ See, e.g., James A. Kay, Jr., *Order*, 16 FCC Rcd 20183, 20184-85 (WTB CWD rel. Nov. 14, 2001) (pending application properly dismissed when underlying license expired); Letter to Ms. Cheryl E. Cox of Lone Star from D’wana R. Terry, Federal Communications Commission (dated September 29, 1999), ordering Lone Star to cease operating on frequencies 936.0000/897.0000 MHz, which had been assigned to Lone Star on September 29, 1998, from Waste Management, since the underlying authorization held by Waste Management had been previously set aside on May 19, 1995; *Jefferson Radio Company, Inc. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964) (where the Commission had terminated the authority to operate the radio station, there was no authorization susceptible of being assigned).

⁹ See, e.g., James A. Kay, Jr., *supra*, 16 FCC Rcd at 20184-85 ¶¶ 5-6.

¹⁰ Supplemental Petition at 2.

¹¹ *Id.* at 3.

that license, and finally, that it is the Commission's delay in acting on the assignment application that caused the license for Station WIK902 to expire.¹²

8. Kay's argument that the assignment application for Station WIK902 was incorrectly dismissed is grounded in the claim that "[o]n information and belief, Mr. Padillo timely filed an application to renew" prior to Station WIK902's license expiration date.¹³ The Commission's licensing records, however, do not reflect the filing of a renewal application for this station. Consequently, the license expired on June 13, 1996. Accordingly, once the license expired, there was nothing for Padilla to assign to Kay and thus, nothing for Kay to modify.

9. Kay further argues that the expiration of a license does not justify the dismissal of a pending application for assignment of that license. In this regard, Kay claims that his portion of the assignment application should have been considered as "an entirely new facilities application prepared in the name of the assignee," and that the filing of such applications cause the underlying license, in accordance with Section 9(b) of the Administrative Procedure Act (APA), to continue in effect pending final action on the application.¹⁴ Kay does not cite any authority in support of his argument, and his interpretation runs counter to Commission precedent that "a proposed assignee has no rights under a station license."¹⁵ Moreover, we reject Kay's argument as inconsistent with the representations contained in the application. By its very terms, the application sought the assignment of an existing license, as opposed to a license for a new station. Section 9(b) of the APA¹⁶ refers to renewal and new applications, not assignment applications, and we reject the notion that they are the same.¹⁷ Therefore, we disagree with Kay's contention that assignment applications are within the express or intended scope of Section 9(b) of the APA.

10. Kay claims that the Bureau's failure to act on the application, rather than the failure of the licensee to file for renewal, caused the license for Station WIK902 to expire.¹⁸ Under such circumstances, Kay contends that the dismissal of the assignment application is unfair.¹⁹ We disagree with Kay's assertions. Kay's argument is mistaken in that it propounds that licensees are not required to file timely renewal applications. The Commission has, to the contrary, repeatedly held that licensees are responsible for filing a timely renewal application for their license.²⁰ In order for an assignment application to be

¹² *Id.* at 6.

¹³ *Id.* at 2.

¹⁴ *Id.* at 4.

¹⁵ *Transit Mix*, 16 FCC Rcd at 15005 ¶ 5.

¹⁶ 5 U.S.C. § 558(b).

¹⁷ In this regard, we note that in the Communications Act Congress distinguishes between applications for new licenses and assignment applications. *See* Communications Act of 1934, *as amended*, 47 U.S.C. §§ 308 (new, modifications, and renewals) and 310(d) (transfers and assignments).

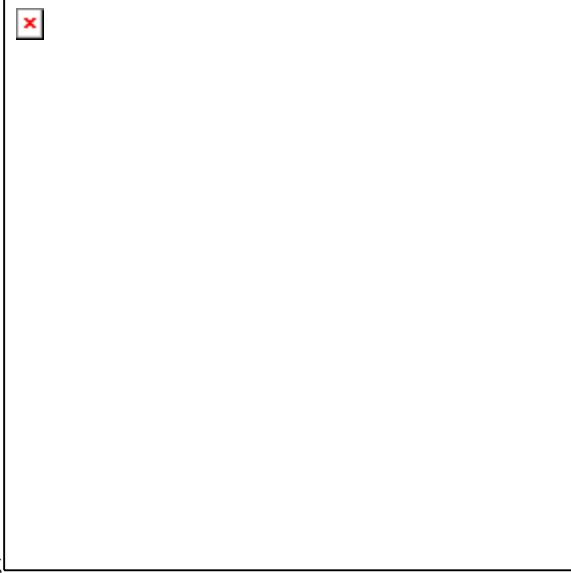
¹⁸ Supplemental Petition at 6.

¹⁹ *Id.*

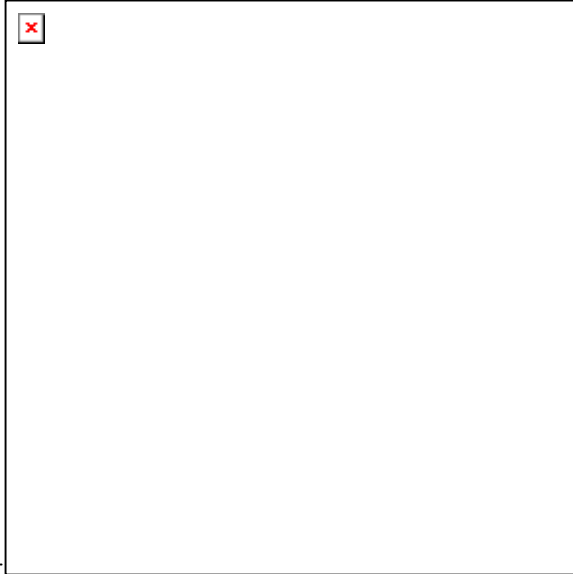
²⁰ *See, e.g., Transit Mix*, 16 FCC Rcd 15,005, ¶ 5; *Sierra Pacific Power Company, Order*, 15 FCC Rcd 188, 190-91 ¶ 6 (2001) (holding that "each licensee bears the exclusive responsibility of filing a timely renewal application"); *Alameda-Contra Costa Transit District Private Land Mobile Stations KBY746, WFS916, and KM8643, Order*, 15 FCC Rcd 24,547, 24,550 ¶ 10 (2000) (holding that "each licensee is responsible for knowing the expiration date of its licenses and submitting a renewal of license application in a timely

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manner"); World Learning, *Order*, 15 FCC Rcd 23,871, 23,872 ¶ 4 (2000) (holding that licensee "is solely responsible for filing a timely renewal



application"); First National Bank of Berryville, *Order*, 15 FCC Rcd 19,693, 19,695-96 ¶ 8 (2000) (holding that "it is the responsibility of each licensee to renew its application (continued....)

granted, the assignor must have a valid license to assign. Because no renewal application was filed, the license for Station WIK902 expired on its terms on June 13, 1996. Consequently, we find that based on the information before the LTAB when it took the subject action, its dismissal of the assignment application was proper.²¹

11. Finally, Kay asserts that even if it is determined that no renewal application was filed, the “Bureau has misstated the facts by which it attempts to justify the dismissal of the pending assignment application.”²² According to Kay, the dismissal letter’s statement that “[t]he license for which this application has been filed has recently expired” reflects an “inexcusable lack of candor.”²³ In particular, Kay takes issue with the language “recently expired,” because the license expiration date was more than four years prior to the date of the dismissal letter, and thus not recent.²⁴ Kay maintains that “[f]or this reason alone, the Bureau’s action must be set aside.”²⁵ We find that Kay’s claims of misrepresentation and lack of candor are without merit. As noted above, the dismissal letters sent to Kay were computer-generated as a result of routine ULS processing. Kay’s contentions are devoid of any specific facts or information to demonstrate otherwise or to support his allegations of misrepresentation and lack of candor.²⁶ Consequently, based on the information before us, we conclude that the LTAB did not take any

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prior to the expiration date of the license"); and Montana Power Company, *Order*, 14 FCC Rcd 21,114, 21,117 ¶ 7 (1999) (holding that "it is the responsibility of each licensee to apply to renew its license prior to the license's expiration date").

²¹ See Letter dated April 5, 2001 from D’wana R. Terry, Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, to Robert D. Ryan, *petition for reconsideration pending* (expired license cannot be assigned). We nonetheless note that if such reconsideration were to be granted, we would then need to revisit the procedural posture of the subject assignment/modification application.

²² Supplemental Petition at 2.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 2-3.

²⁶ We nonetheless recognize Kay’s observation that the use of “recently expired” was not a proper characterization under the specific circumstances presented in the instant matter. Thus, we will review the boilerplate language used in such computer-generated letters in the future.

incorrect action with respect to its disposition of the assignment/modification application pertaining to Station WIK902.

12. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.106 and 1.62 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.62, the petition for reconsideration filed by James A. Kay, Jr. on January 2, 2001 IS GRANTED to the extent indicated herein, and is otherwise DENIED.

13. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Supplemental Petition for Reconsideration filed by James A. Kay, Jr. on January 3, 2001 IS DENIED.

14. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Barry J. Ohlson
Acting Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau